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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FRANCISCO JAVIER MUNOZ, JR., Defendant and Appellant.	G056052 (Super. Ct. No. 16NF3315) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Jonathan S. Fish, Judge. Affirmed in part, vacated in part. Remanded with directions.

Joshua L. Siegel, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, Craig H. Russell, and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Francisco Javier Munoz, Jr., of committing a lewd act on a child under age 14. (Pen. Code, § 288, subd. (a).) Defendant admitted he had a prior conviction for a sex offense (Pen. Code, § 667.51, subd. (a)), a prior strike conviction (Pen. Code, § 667, subds. (d) & (e)(1)), and a prior prison commitment (Pen. Code, § 667.5, subd. (b)).

The court imposed a 22-year prison sentence, comprising an upper term of eight years on the substantive offense, doubled to 16 years under the "Three Strikes" law, plus five years for the prior sex offense conviction, and one year for the prison prior. The court also ordered defendant to undergo AIDS testing pursuant to Penal Code section 1202.1.

On appeal, defendant raises several contentions: (1) The trial court erred during jury selection by denying defendant's *Batson*/*Wheeler*[1] motion based on the prosecutor's alleged improper use of peremptory challenges. (2) The trial court prejudicially erred in admitting evidence of defendant's prior crimes under Evidence Code sections 1101, subdivision (b), and 1108 (all statutory references are to the Evidence Code unless otherwise stated). (3) The prosecutor committed reversible misconduct by misstating reasonable doubt and lessening the burden of proof in his closing argument. (4) To the extent defense counsel failed to object to the prosecutor's alleged misconduct, defendant was denied effective assistance of counsel. (5) Even if individually insufficient to warrant reversal, the cumulative effect of the errors in claims (1) through (4) requires reversal. (6) We should independently review the victim's confidential school records to determine whether the trial court erred in ruling they contained no discoverable materials. (7) The trial court erred in ordering AIDS testing as part of defendant's sentence.

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[1] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*), rejected on other grounds in *Johnson v. California* (2005) 545 U.S. 162, 173 (*Johnson*).

We reject defendant's claims (1) through (4). Because there are no errors to cumulate, we also reject his cumulative error contention. The Attorney General does not object, so we have reviewed the victim's school records, and found nothing that should have been discovered to the defense. However, the order requiring defendant to submit to AIDS testing is vacated, and the matter remanded with directions, because the trial court did not comply with section Penal Code section 1202.1. In all other respects, the judgment is affirmed.

FACTS

Prosecution Case

One day in 2016, eight-year-old G.L. went to the market near her home. She picked out her purchases and got in line to pay. Defendant approached and dropped his keys in front of her. G.L. tried to pick up the keys for him, but defendant bent down, grabbed the keys, and tried to look up her shorts. She was sure he tried to look up her shorts because when he crouched down to get his keys, he was looking up, instead of at the keys on the floor. Defendant then left the store.

G.L. paid for her items, left the market, and walked through the parking lot and back to her apartment building. Defendant was walking in front of her and, as she passed him, he turned and once more dropped his keys. She bent over to pick up the keys, but defendant again picked them up first. While crouching down, defendant said something like "can I see," or "can I just see," put his hand up the inside of G.L.'s shorts, and touched her vaginal area over her underwear. He then walked away.

G.L. ran home and told her mother what occurred. She and her parents returned to the store, the police were called, and G.L. told the officers what had happened.

Surveillance video from inside the store showed a man bend down in front of G.L. as she had described. G.L. testified the man in the video was the same man who had touched her outside the market.

A police detective recognized the man in the video as defendant. She was familiar with defendant because she had been monitoring him and his global position system (GPS) device as part of her duties. The parties stipulated that GPS data from defendant's device showed he had been both inside the market and outside near the market at the time of the incident.

Defense Case

A forensic scientist testified there were two DNA profiles on G.L.'s underwear. One belonged to G.L., and the other to an unknown male other than defendant. She opined that merely touching G.L.'s underwear would be unlikely to leave a detectable amount of DNA.

Prior Convictions

The parties stipulated to four prior sex offense convictions defendant had suffered, one each in 2014 and 2011, and two in 2006. We discuss the details of those convictions below when we address defendant's claim that their admission was error.

DISCUSSION

1. *The Trial Court Did Not Err by Denying Defendant's Batson/Wheeler Challenge*

A. Background

During voir dire, the prosecutor excused three prospective jurors relevant to our inquiry here: Juror No. 110; Juror No. 118; and Juror No. 107. After Juror No. 107 was excused, defense counsel raised a *Batson*/*Wheeler* challenge. She asserted these three excused jurors were "young Hispanic" men, with "Latino" surnames.[2]

The trial court noted that the prosecutor had exercised seven peremptory challenges to that point, some of whom were "non-Latino," and that the current panel of 12 included three Latinos. Defense counsel responded that the three Latinos still on the

[2] The terms "Hispanic" and "Latino" (or "Latina") were used below as if they were interchangeable. Here we have no evidence as to any of the jurors' actual ethnicities, so we will simply use the terms "Latino/Latina."

jury were not in "the age range" of the three she was concerned about. Moreover, all three were women.

The trial court found the prosecutor's questions to that point were routine, all jurors were questioned equally, and no disparate questioning indicated any group bias. Nonetheless, the court found "it is fair to say that the challenges to the Latino jurors were disproportionate," and concluded "the defense has made a prima facie case." The court then asked the prosecutor for his reasons for excluding Juror Nos. 118, 110, 107, and 127.[3]

The prosecutor stated his reasons, which we discuss in detail below, and the court denied defendant's *Batson*/*Wheeler* challenge. In explaining the reasons for his challenges, the prosecutor stated he had also excluded two older female Caucasian Juror Nos. 125 and 148. Beyond this, the record does not reflect the ethnic or gender composition of the final 14-member panel (12 jurors & two alternates), of the full venire from which they were selected—including other prospective jurors in the courtroom audience—or of all the excluded jurors.

B. Legal Background

"Both the United States and California Constitutions prohibit discriminatory use of peremptory strikes. [Citations.] To assess whether such prohibited discrimination has occurred, our inquiry under *Batson*/*Wheeler* follows three distinct, familiar steps. First, the party objecting to the strike must establish a prima facie case by showing facts sufficient to support an inference of discriminatory purpose. [Citation.] Second, if the objector succeeds in establishing a prima facie case, the burden shifts to the proponent of the strike to offer a permissible, nonbiased justification for the strike.

[3] Defense counsel also noted the prosecutor excused Juror No. 127, a woman with a Latino surname, although her "prime concern" was with the three men. The prosecutor offered his reason for excluding her, which the trial court agreed was valid. Defendant does not contest the prosecutor's challenge to Juror No. 127 on appeal, so we need not address it further.

[Fn. omitted.] [Citation.] Finally, if the proponent does offer a nonbiased justification, the trial court must decide whether that justification is genuine or instead whether impermissible discrimination in fact motivated the strike." (*People v. Reed* (2018) 4 Cal.5th 989, 999.) "The 'Constitution forbids striking even a single prospective juror for a discriminatory purpose.'" (*Foster v. Chatman* (2016) 578 U.S. ___, ___ [136 S.Ct. 1737, 1747].) Such exclusion constitutes structural error, requiring reversal. (*People v. Silva* (2001) 25 Cal.4th 345, 386.)

"The ultimate burden of persuasion regarding [improper] motivation rests with, and never shifts from, the opponent of the strike." (*People v. Lenix* (2008) 44 Cal.4th 602, 612-613 (*Lenix*); see also *Johnson v. California* (2005) 545 U.S. 162, 170-171.) "'We review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges "'with great restraint.'" [Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal.'" (*People v. Winbush* (2017) 2 Cal.5th 402, 434 (*Winbush*).)

Here, the People do not dispute the trial court's step one finding that a prima facie case had been established. Thus, "[a]t step two of the analysis, the prosecutor 'must provide a "'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." [Citation.] "The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." [Citation.] A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons.' [Citation.]" (*Winbush, supra*, 2 Cal.5th at p. 434.) Here, satisfying step two, the court requested the prosecutor to explain

why he excused the three jurors defendant identified as showing discriminatory motivations, and he did so.

Accordingly, we focus on the third *Batson*/*Wheeler* step, and examine whether the trial court correctly determined defendant failed to establish the three male Latino jurors were excused due to intentional discrimination. (See *People v. Mills* (2010) 48 Cal.4th 158, 174; *Lenix, supra*, 44 Cal.4th at p. 613, fn. 8.)[4]

C. Analysis

"At the third step of [*Batson*/*Wheeler*] analysis, after a prosecutor has posited a race-neutral explanation for a peremptory challenge, 'the trial court must decide whether the movant has proven purposeful discrimination. [Citation.] In order to prevail, the movant must show it was '"more likely than not that the challenge was improperly motivated."' [Citation.] This portion of the *Batson/Wheeler* inquiry focuses on the subjective genuineness of the reason, not the objective reasonableness. [Citation.] At this third step, the credibility of the explanation becomes pertinent. To assess credibility, the court may consider, '"among other factors, the prosecutor's demeanor; . . . how reasonable, or how improbable, the explanations are; and . . . whether the proffered rationale has some basis in accepted trial strategy."' [Citation.] To satisfy herself that an explanation is genuine, the presiding judge must make "a sincere and reasoned attempt" to evaluate the prosecutor's justification, with consideration of the circumstances of the case known at that time, her knowledge of trial techniques, and her observations of the prosecutor's examination of panelists and exercise of for-cause and peremptory challenges. [Citation.] Justifications that are "implausible or fantastic . . . may (and probably will) be found to be pretexts for purposeful discrimination." [Citation.] We

[4] Defendant's trial counsel included the jurors' youth as an additional ground for discriminatory juror challenges. However, "age" is not an identifiable group for purposes of *Batson/Wheeler*. (*People v. Ayala* (2000) 24 Cal.4th 243, 278 [the young are not a cognizable group, and age alone does not identify a distinctive or cognizable group]; see also *People v. McCoy* (1995) 40 Cal.App.4th 778, 784.)

recognize that the trial court enjoys a relative advantage vis-à-vis reviewing courts, for it draws on its contemporaneous observations when assessing a prosecutor's credibility.' [Citation.]" (*People v. Woodruff* (2018) 5 Cal.5th 697, 753 (*Woodruff*); see *People v. Gutierrez* (2017) 2 Cal.5th 1150, 1158 (*Gutierrez*) [focus is on subjective genuineness of prosecutor's reasons].) Thus, "the issue comes down to whether the trial court finds the prosecutor's . . . explanations to be credible." (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 339 (*Cockrell*).)

"'Although we examine the entire record when conducting our review, certain types of evidence are especially relevant. These include whether a party has struck most or all of the members of the venire from an identified group, whether a party has used a disproportionate number of strikes against members of that group, whether the party has engaged those prospective jurors in only desultory voir dire, whether the defendant is a member of that group, and whether the victim is a member of the group to which a majority of remaining jurors belong. [Citation.] We may also consider nondiscriminatory reasons for the peremptory strike that "necessarily dispel any inference of bias," so long as those reasons are apparent from and clearly established in the record.' [Citation.]" (*Woodruff, supra,* 5 Cal.5th at p. 749.)

As part of our third stage review, we may engage in a comparative analysis of the jurors at issue and other jurors, but only to the extent we have an adequate record. (*Gutierrez, supra*, 2 Cal.5th at p. 1174.) "'The rationale for comparative juror analysis is that a side-by-side comparison of a prospective juror struck by the prosecutor with a prospective juror accepted by the prosecutor may provide relevant circumstantial evidence of purposeful discrimination by the prosecutor. [Citations.]'" (*Winbush, supra*, 2 Cal.5th at p. 442.) While not determinative, it is probative. (*People v. Smith* (2018) 4 Cal.5th 1134, 1147, citing *Lenix, supra,* 44 Cal.4th at p. 627.)

Even so, our Supreme Court has cautioned "'"that comparative juror analysis on a cold appellate record has inherent limitations." [Citation.] In addition to

the difficulty of assessing tone, expression, and gesture from the written transcript of voir dire, we [must] keep in mind the fluid character of the jury selection process and the complexity of the balance involved. "Two panelists might give a similar answer on a given point. Yet the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror, on balance, more or less desirable."'" (*Winbush, supra*, 2 Cal.5th at p. 442.)

We are also mindful that "[a] trial court's conclusions are entitled to deference only when the court made a 'sincere and reasoned effort to evaluate the nondiscriminatory justifications offered.' [Citation.]" (*Gutierrez, supra*, 2 Cal.5th at p. 1159.) Thus, "'[W]hen the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient.' [Citation.]" (*Id.* at p. 1171.) In addition, courts may not "substitute their own reasoning for the rationale given by the prosecutor, even if they can imagine a valid reason that would not be shown to be pretextual. '[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. . . . If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.' [Citation.]" (*Id.* at p. 1159.)

We now turn to an examination of the circumstances in which the prosecutor excused the three male Latino prospective jurors identified by defendant. As we explain below, the trial court considered and evaluated the merits of the prosecutor's stated reasons for excusing these jurors, finding each peremptory challenge was supported by a permissible motive. Applying the appropriate deferential standard of review, we conclude substantial evidence supports the trial court's assessment of the prosecutor's stated reasons. (*Lenix, supra*, 44 Cal.4th at pp. 613-614.)

i. *Juror No. 118*

Juror No. 118 was unemployed, single, and had no children. He had a relative with a criminal conviction but said he could be fair and impartial to both sides. When asked if he thought it was unfair that the prosecutor had to prove each element of the offense, he responded, "No. If that is the system, I guess it is what it is." When asked if he would share his opinion with other jurors even if he were the only one who held the opinion, he responded, "I don't know what to say about that." When asked again, he stated, "I would share my opinion with the whole group, I guess" but that it would be difficult because he was a shy person.

As for excusing Juror No. 118, the prosecutor explained: "I exercised my peremptory challenge on him because I noticed when there was a question about his relative being convicted of a crime and there was a question about whether or not he could still be fair, I noticed that he seemed to hesitate a little bit before saying he could be fair. [¶] So, I was watching his body language and his cues. And, to me, it looked like he hesitated a little bit on that. So, that gave me a bit of a concern. Even though he was answering he could be fair, I didn't feel that he necessarily could be, and that he might [be] holding something back."

The court responded: "As to [Juror No.] 118, my notes say unemployed, slow, not paying attention, and relative convicted of a crime. My memory of him was he was unengaging and uninterested in the proceedings. I think that is a pretty clear reason it is race neutral and gender neutral for his peremptory challenge on [Juror No.] 118."

The prosecutor's reasons are plausible and supported by the record. Having a relative convicted of a crime is a race and gender neutral reason to excuse a juror. (*People v. Panah* (2005) 35 Cal.4th 395, 442.) As for the juror's hesitancy before answering the question whether he could be fair, body language and demeanor—something that does not appear in an appellate record—we defer to the trial court's evaluation. (*People v. Reynoso* (2003) 31 Cal.4th 903, 924-925 (*Reynoso*).) "A

prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons." (*Lenix, supra*, 44 Cal.4th at p. 613; *People v. Ward* (2005) 36 Cal.4th 186, 202 [demeanor]; *People v. Trevino* (1997) 55 Cal.App.4th 396, 409 ["bare looks and gestures"]; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1047 [juror "frowning"].)

Moreover, "[i]t is well settled that '[p]eremptory challenges based on counsel's personal observations are not improper.' [Citation.]" (*Reynoso, supra*, 31 Cal.4th at p. 917.) The fact that defense counsel did not counter the prosecutor's explanation—something which we would expect in this context if the observations were not accurate—bolsters our confidence in the trial court's credibility determination. (*People v. Adanandus* (2007) 157 Cal.App.4th 496, 510 (*Adanandus*) [neither the court nor counsel's account of the challenged jurors' demeanor, suggesting the prosecutor's description was accurate].)

Defendant has not shown error in the trial court's *Batson*/*Wheeler* determination concerning Juror No. 118.

ii. Juror No. 107

Juror No. 107 was a "filling operator," "assigned to quality control." He had no children and did not explicitly disclose his marital status, although the prosecutor later described him as single with no objection from the court or counsel. The juror said it would not be "a bother to me at all" if the defendant did not testify.

The prosecutor stated: "Juror 107, and, again, for a lot of these as well, I also noticed he didn't seem to have a lot of experience with kids. And I do know that wasn't the sole factor, but that combined with these other factors, pushed me in that direction. [¶] [S]ingle, he didn't have any kids. Yesterday . . . when I was asking him questions, I felt like he was giving me some funny looks. And that made me a bit uncomfortable. [¶] Obviously this is a quick process and I have to make decisions on that . . . ."

The trial court said: "The prosecution's reasoning . . . [was] that that juror had no children, and he gave him funny looks. I don't know about the funny looks, but the case law supports that not having children is an acceptable reasonably neutral reason for using a peremptory challenge in a case where a child is a victim. I accept that for the challenge to [Juror No.] 107."

Each of these reasons is plausible and both are race and gender neutral. In *People v. Lomax* (2010) 49 Cal.4th 530, the prosecutor explained that he generally preferred to have "older, more conservative people" on the jury. The court found "[a] potential juror's youth and apparent immaturity are race-neutral reasons that can support a peremptory challenge." (*Id*. at p. 575; see *People v. Jones* (2017) 7 Cal.App.5th 787, 805-806 [age, marital status, and lack of children are group-neutral reasons for peremptory challenge]; *People v. Gonzales* (2008) 165 Cal.App.4th 620, 631 [youth and lack of life experience]; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1328 [limited life experience]; *Stubbs v. Gomez* (9th Cir. 1999) 189 F.3d 1099, 1106 (*Stubbs*) [employment status and personal history].) Juror No. 107 was apparently single, and a prosecutor's preference for married jurors is an acceptable race-neutral basis for a peremptory challenge. (*U.S. v. Omoruyi* (9th Cir. 1993) 7 F.3d 880, 881; cf. *People v. Arias* (1996) 13 Cal.4th 92, 139 [age and marital status].)

As the Supreme Court observed in *Rice v. Collins* (2006) 546 U.S. 333, 341, it is not unreasonable for a prosecutor to believe a young person with few ties to the community might be less willing than an older, more permanent resident to impose a substantial penalty. And, once more, peremptory challenges based on counsel's personal observations are not improper (*Reynoso, supra*, 31 Cal.4th at p. 917), and the fact that defense counsel did not counter the prosecutor's explanation is probative. (*Adanandus, supra*, 157 Cal.App.4th at p. 510.)

Defendant contends the prosecutor's credibility regarding lack of experience with children is suspect because it was not until after the denial of the

Batson/*Wheeler* motion that he began to ask "extensive questions" of prospective jurors about their experiences with children.

We are unsure what constitutes "extensive questions," but even assuming this is true, "[d]efendants who wait until appeal to argue comparative juror analysis must be mindful that such evidence will be considered in view of the deference accorded the trial court's ultimate finding of no discriminatory intent. [Citation.] Additionally, appellate review is necessarily circumscribed. The reviewing court need not consider responses by stricken panelists or seated jurors other than those identified by the defendant in the claim of disparate treatment." (*Lenix, supra*, 44 Cal.4th at p. 624.) Consequently, "the trial court's finding is reviewed on the record as it stands at the time the *Wheeler/Batson* ruling is made. If the defendant believes that subsequent events should be considered by the trial court, a renewed objection is required to permit appellate consideration of these subsequent developments." (*Ibid.*) Here, no such renewed objection was made, and any inference to be drawn from why the prosecutor may or may not have asked more questions regarding prospective jurors' experiences with children after the *Batson/Wheeler* motion would be mere speculation.

In *Hernandez v. New York* (1991) 500 U.S. 352, 369 (*Hernandez*), the court found that the fact that victims and prosecution witnesses were Latinos undercut any motive to exclude Latinos from a jury. Here, the defendant, the victim, several witnesses, including the investigating detective and the victims in the prior cases, were all Latino/Latina or had Hispanic surnames.

Defendant seeks to minimize this point by suggesting that, while this is true, all of these persons other than defendant were female. Nonetheless, defendant provides no authority to suggest that we should ignore the fact these persons were Latinas in assessing the prosecutor's motivations with regard to defendant's claim of *ethnic-based* challenges. For the same reason, defendant suggests we should ignore the fact that three Latina women were already seated as jurors when the *Batson*/*Wheeler* motion was

made.[5] We are not persuaded. "Although '"the fact that the jury included members of a group allegedly discriminated against is not conclusive, it is an indication of good faith in exercising peremptories, and an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection.'" [Citation.]" (*People v. Williams* (2013) 56 Cal.4th 630, 663.)

"The trial court took a permissible view of the evidence in crediting the prosecutor's explanation. . . . The trial court, moreover, could rely on the fact that only three challenged jurors can with confidence be identified as Latinos, and that the prosecutor had a verifiable and legitimate explanation for two of those challenges. Given these factors, that the prosecutor also excluded one or two Latino venirepersons on the basis of a subjective criterion having a disproportionate impact on Latinos does not leave us with a 'definite and firm conviction that a mistake has been committed.' [Citation.]" (*Hernandez, supra,* 500 U.S. at pp. 369-370.) So too here.

Jury selection is a dynamic process which involves a complex balancing of a multitude of factors by the prosecution and the defense. (*Woodruff, supra*, 5 Cal.5th at p. 754.) A comparison to jurors who are dissimilar in material aspects from an excused juror's characteristics relied upon by the prosecutor offers little if no comparative value in this context. (See *Miller-El v. Dretke* (2005) 545 U.S. 231, 247 & fn. 6; *Winbush, supra*, 2 Cal.5th at p. 443.)

Additionally, similar answers to a question during voir dire are not, by themselves, dispositive. A "'[m]yriad [of] subtle nuances . . . , including attitude, attention, interest, body language, facial expression and eye contact[,] . . . may legitimately impact the prosecutor's decision to strike or retain the prospective juror." (*People v. Williams* (2013) 56 Cal.4th 630, 662.) But a cold transcript cannot convey those subtleties. (*Ibid.*) And because defendant did not raise the issue of comparative

[5] Defense counsel below similarly conflated this gender-related fact with regard to the Latina jurors who were not excused by the prosecution, and went even further by also injecting age into the equation—an irrelevant distinction for *Batson*/*Wheeler* inquiry.

analysis in the trial court, the prosecutor never had the opportunity to explain any perceived differences between Juror No. 107 and the other jurors. (See *Lenix, supra*, 44 Cal.4th at p. 623.) Thus, "'"a formulaic comparison of isolated responses [is] an exceptionally poor medium to overturn a trial court's factual finding"'" concerning the subjective sincerity of a prosecutor's proffered reasons for excusing a juror. (*Winbush, supra*, 2 Cal.5th at p. 442.)

In sum, substantial evidence supports the trial court's conclusion the prosecutor challenged Juror No. 107 for reasons other than race or gender.

iii. Juror No. 110

Juror No. 110 was a driver for a car dealership. He was single, with no children, and had no relatives in law enforcement. He knew no one convicted of a crime. He stated he would look at the evidence in determining the truth and would evaluate the victim's testimony given all the evidence. When asked if he understood the prosecutor needed to prove the case beyond a reasonable doubt, he answered, "All right." But when asked if he would hold the prosecutor to a higher standard to prove the case beyond all possible doubt, he said, "Correct."

The prosecutor said: "For [Juror No.] 110, when he was answering the questions, I got the sense thast he had a bit of trouble—he was a bit shy, which gave me a little bit of pause, and he also seemed to have a bit of trouble—and, again, this is from body language that I saw, how he was answering the questions, he was a little bit unsure of himself . . . he seemed like he wasn't understanding totally the process and the questions that were being asked by counsel."

The court stated: "Number 110 gives me a little more . . . pause. The reasons given, . . . shy or hesitant, are certainly subjective. I have nothing in my notes that indicates anything particular about [Juror No.] 110 for race or gender neutral reasons. So, I did not quite understand that. [¶] What I saw was a respectful, well-dressed, young man. And age was not given as a race neutral factor by the People. However, at this

point, given that there is no real motive to excuse either men or Latinos for inappropriate reasons, and having heard group of gender neutral reasons that were acceptable up to [Juror No.] 110, I am going to accept [the prosecutor's] reasoning as to number 110 as genuine and not pretextual, and find that the prosecutor's stated neutral reasons are appropriate. [¶] I think it is pretty close, but I find that the objecting party has not proved bias by the low standard, a preponderance of the evidence, for ethnic, for gender bias."

The prosecutor's explanations are credible. With the burden on the prosecution of proving guilt beyond a reasonable doubt, the concern about jurors being disinterested and not paying attention during trial is obvious. (See *Stubbs, supra*, 189 F.3d at p. 1105 [passivity and inattentiveness are "'valid, race-neutral explanations for excluding jurors'"]; *U.S. v. Power* (9th Cir. 1989) 881 F.2d 733, 740 [demeanor during voir dire that "made the prosecutor believe [juror] would not be an attentive juror" is adequate race-neutral explanation].)

While we acknowledge we are unable to discern from the record whether Juror No. 110 actually behaved in the manner described by the prosecutor, particularly because the trial court did not seem to see the same behavior, it does not impede our review. Our Supreme Court has confirmed that "[a] prosecutor's demeanor observations, even if not explicitly confirmed by the record, are a permissible race-neutral ground for peremptory excusal, especially when they are not disputed in the trial court." (*People v. Mai* (2013) 57 Cal.4th 986, 1052.) There was no such dispute in this case.[6]

Defendant argues that the prosecutor's allegedly mistaken belief Juror No. 110 was "shy," when it was Juror No. 118 who had admitted his shyness, shows his bias. Not so.

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[6] Defense counsel questioned whether Juror No. 110 was "shy," or was "having trouble or didn't understand the process." She said she did not "see anything" like this, but she acknowledged she could not "look at everything that is happening in the courtroom during jury selection."

First, there is no requirement that a prospective juror specifically acknowledge a character trait that could be equally apparent from mere observation, and defendant offers no contrary authority. Moreover, there is no requirement a prosecutor must follow up and explore such a trait by further voir dire of the prospective juror. Shyness is such a trait.

Second, even assuming the prosecutor was mistaken, it does not necessarily show bias. In *People v. Williams* (1997) 16 Cal.4th 153, 188, a *Batson*/*Wheeler* motion challenged the excusal of a juror whom the prosecutor stated he had excused "in error." The court found no violation of *Batson*/*Wheeler*, holding that "a genuine 'mistake' is a race-neutral reason." (*Id.* at p. 189.) Similarly, in another case, the prosecutor gave a reason for excusing a juror, which, the prosecutor later discovered and informed the court, was mistakenly based on information in the questionnaire of another juror with the same last name. (*People v. Phillips* (2007) 147 Cal.App.4th 810, 814.) Citing *Williams*, the court found no *Batson/Wheeler* violation. (*Phillips*, at p. 819.)

Furthermore, nothing "'disallows reliance on the prospective jurors' body language or manner of answering questions as a basis for rebutting a prima facie case' of exclusion for group bias. [Citations.] . . . 'Nowhere does *Wheeler* or *Batson* say that trivial reasons are invalid. What is required are reasonably specific and neutral explanations that are related to the particular case being tried.' [Citation.]" (*Reynoso, supra*, 31 Cal.4th at p. 917.)

The prosecutor stated that this juror "seemed like he wasn't understanding totally the process and the questions that were being asked by counsel." This is supported in the record by the juror's equivocal answers regarding proof beyond a reasonable doubt versus proof beyond all possible doubt.

The proper focus of a *Batson*/*Wheeler* inquiry is on the subjective genuineness of the race-neutral reasons given for the peremptory challenge, not on the objective reasonableness of those reasons. (*Purkett v. Elem* (1995) 514 U.S. 765, 768-

769.) "'[T]he issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." (*Id.* at p. 768.)

Thus, at the third stage of *Batson/Wheeler* the "critical question . . . is the persuasiveness of the prosecutor's justification for his peremptory strike." (*Cockrell, supra*, 537 U.S. at pp. 338-339.) Usually, "the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (*Id.* at p. 339.) Moreover, an """"'evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province."""""" (*People v. Smith* (2018) 4 Cal.5th 1134, 1147.) "'Thus, in reviewing a trial court's reasoned determination that a prosecutor's reasons for striking a juror are sincere, we typically defer to the trial court.'" (*Ibid.*)

The trial court suggested that in some respects, Juror No. 110 would appear to be a fine juror for the prosecution. "But the question is not whether a prosecutor should or should not have excused a prospective juror. It is whether this prosecutor excused him for an improper reason." (*People v. Hardy* (2018) 5 Cal.5th 56, 84 (*Hardy*).) The record provides no sufficient reason to so conclude, or for this court to overturn the trial court's ruling regarding this juror.

Defendant finds fault with the trial court's allegedly incomplete and cursory findings regarding this juror. But nothing "requires a trial court to make explicit and detailed findings for the record in every instance in which the court determines to credit a prosecutor's demeanor-based reasons for exercising a peremptory challenge. The impracticality of requiring a trial judge to take note for the record of each prospective juror's demeanor with respect to his or her ongoing contacts with the prosecutor during voir dire is self-evident." (*Reynoso*, *supra*, 31 Cal.4th at p. 929.) Moreover, the trial

court's lack of personal recollection of the juror's demeanor does not remove any and all basis for deference to the trial court's ruling on the *Batson*/*Wheeler* motion. (*Thaler v. Haynes* (2010) 559 U.S. 43, 49.) Thus, a trial court is not required "'"to make explicit and detailed findings for the record in every instance in which the court determines to credit a prosecutor's demeanor-based reasons for exercising a peremptory challenge."'" (*Hardy*, *supra*, 5 Cal.5th 56 at pp. 76-77.)

Where "the trial court is fully apprised of the nature of the defense challenge to the prosecutor's exercise of a particular peremptory challenge, where the prosecutor's reasons for excusing the juror are neither contradicted by the record nor inherently implausible [citation], and where nothing in the record is in conflict with the usual presumptions to be drawn, i.e., that all peremptory challenges have been exercised in a constitutional manner, and that the trial court has properly made a sincere and reasoned evaluation of the prosecutor's reasons for exercising his peremptory challenges, then those presumptions may be relied upon, and a *Batson*/*Wheeler* motion denied, notwithstanding that the record does not contain detailed findings regarding the reasons for the exercise of each such peremptory challenge." (*Reynoso, supra*, 31 Cal.4th at p. 929.) Given the plausible nature of the prosecutor's explanations, and the record before us, the trial court was under no obligation to inquire further as to Juror No. 110. (*Id*. at p. 923; *People v. Silva* (2001) 25 Cal.4th 345, 386.) Consequently, we find no error in its denial of defendant's *Batson/Wheeler* motion as to Juror No. 110.

At oral argument, defendant's counsel cited *Flowers v. Mississippi* (2019) __ U.S. __ [139 S.Ct. 2228] (*Flowers*), but acknowledged it was not "ground-breaking." It is also not applicable.

In *Flowers*, the high court applied established *Batson* analysis to a case we can only characterize as one of the worst examples of discriminatory challenges in jury selection we have ever seen. (See *Flowers, supra,* 139 S.Ct. at p. 2251 (conc. opn. of Alito, J.) ["[T]his is a highly unusual case. Indeed, it is likely one of a kind"].) Flowers

had previously been tried five times for the same murders. Three times he was convicted and sentenced to death, and all three convictions were reversed by the Mississippi Supreme Court. In the other two trials, the jurors could not reach a verdict. "In all of the five prior trials, the State was represented by the same prosecutor and . . . many of those trials were marred by racial discrimination in the selection of jurors and prosecutorial misconduct. Nevertheless, the prosecution at the sixth trial was led by the same prosecutor . . . ." (*Id.* 139 S.Ct. at pp. 2251-2252 (conc. opn. of Alito, J.).) The prosecutor's "pattern of striking black prospective jurors persisted from Flowers' first trial through Flowers' sixth trial. In the six trials combined, [the prosecutor] struck 41 of the 42 black prospective jurors [he] could have struck. At the sixth trial, [the prosecutor] struck five of six. . . . [M]oreover, [he] engaged in dramatically disparate questioning of black and white prospective jurors. And . . . engaged in disparate treatment of black and white prospective jurors . . . ." (*Id*. 139 S.Ct. at p. 2251 (lead opn. of Kavanaugh, J.).)

In the end, the court concluded "we break no new legal ground. We simply enforce and reinforce *Batson* by applying it to the extraordinary facts of this case." (*Flowers, supra*, 139 S.Ct. at p. 2251 (lead opn. of Kavanaugh, J.).) This case is not *Flowers*.

Here, the trial court reviewed its notes from voir dire and stated its observations were consistent with the prosecutor's explanation for striking Juror No. 118. The court accepted the prosecutor's explanation that Juror No. 107 was excused because of his lack of experience with children. And the court accepted the prosecutor's explanations regarding Juror No. 110 as well. It found no motive for excusing either Latinos or men, and that defendant had therefore not met its burden to show discriminatory juror challenges.

On balance, after examining the entire record we find the trial court made "a sincere and reasoned effort" to evaluate the prosecutor's justifications in this matter, and we conclude substantial evidence supports the court's ruling denying defendant's

Batson/Wheeler motion. Accordingly, we accord its decision the deference to which it is entitled. (*Lenix, supra*, 44 Cal.4th at pp. 613-614.)

2. The Trial Court Did Not Err in Admitting Evidence of Defendant's Prior Convictions

Defendant next contends the trial court prejudicially erred by admitting evidence of his prior convictions. Three of these prior convictions were for sexual offenses listed in section 1108 (hereafter 1108; see 1108, subd. (d)(1)(A) & (F).) The fourth was a sexually-related offense not included in 1108, but which was admitted under section 1101, subdivision (b) (hereafter 1101(b)). Because the evidence was admitted under separate provisions of the Evidence Code, and the analysis is slightly different, we address them separately. In the end, we find the trial court did not abuse its discretion in admitting evidence of these four prior crimes.

A. Background

Before trial, the prosecutor moved to admit evidence of five prior sex crimes committed by defendant in 1993, 1995, January 2006, June 2006, and 2014, under 1108. In addition, he moved to admit a 2011 incident under 1101(b). The defense filed a motion to exclude the same evidence.

The court ruled: "The October 29, 1993, October . . . 1995, those are excluded . . . for 1108 purposes under [section] 352 analysis. They're remote, dissimilar, and potentially unreliable given the victim's age. [¶] However, [the] January [2006], [June 2006], and May [2014] are different. They're not remote in the sense that the law considers, because after punishment from the 2006 to 2011, there really was not enough time to where I would consider them remote, and they are relevant, of course, for the defendant's propensity. [¶] The fact that they're are dissimilar does not matter. The . . . similarity test under [*People v.*] *Ewoldt*[7] is . . . one of the ways to prevent a fact finder from using other evidence as propensity. But 1108 is exactly the purpose of it. [¶]

[7] *People v. Ewoldt* (1994) 7 Cal.4th 380 (*Ewoldt*).

The next question is under the July . . . 2011 [case], it can come [in] under 1101(b) for absence of mistake and intent, and there is sufficient similarity under *Ewoldt*."

i. The January 2006 Offense (*1108*)

J.G. testified that when she was 14 or 15 years old, she awoke to find her pants around her ankles and defendant kissing her. He grabbed her by the face and tried to pull her closer to him. J.G. pulled up her pants and hid in the bathroom until her mother got home, but by then defendant had left. Defendant left a bottle of lubricant jelly on the side of J.G.'s bed, and she noticed that there was "wetness" on her stomach that had not been there when she had gone to sleep. The parties stipulated that defendant was convicted of lewd acts on a child age 14 or 15 (Pen. Code, § 288, subd. (c)(1)).

ii. The June 2006 Offense (*1108*)

P.V. testified that when she was six years old, she was playing outside her apartment complex when defendant, who also lived in the complex, came out his front door with his penis exposed and made a "come here" motion at her with his index finger. The parties stipulated that defendant was convicted of attempted lewd acts on a child under age 14 (Pen Code, §§ 664, subd. (a), 288, subd. (a)), child annoyance (Pen. Code, § 647.6, subd. (a)), and indecent exposure (Pen Code, § 314, subd. 1).

iii. The May 2014 Offense (*1108*)

D.G., who was 14 years old when she testified in 2018, said that in 2014 she was living in an apartment in Anaheim with her grandmother. She was talking to a friend outside her apartment when defendant walked by while smoking a cigarette. Defendant walked by her again, and this time he had unzipped his pants, and his penis was "sticking out" of his pants. The parties stipulated that defendant was convicted of felony indecent exposure (Pen. Code, § 314, subd. 1).

iv. The July 2011 Offense (*1101*(*b*))

J.L. testified she went to a store with her family. J.L. and her daughter, who was nine or 10 years old at the time, were shopping when she noticed defendant on

his hands and knees behind them, holding his cell phone under her daughter's dress. J.L. yelled for security, and defendant was held at the store until police came. The parties stipulated defendant was convicted of disorderly conduct (Pen. Code, § 647, subd. (j)(2) [photographing a person under or through her clothing so as to view her body or undergarments for sexual gratification]).

B. Analysis

i. 1108 Evidence

Section 1108 "carves out an exception" to the general prohibition of character evidence. (*People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 823.) Section 1108, subdivision (a), provides that "[i]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by . . . 1101, if the evidence is not inadmissible pursuant to Section 352" (hereafter 352). (See *People v. Story* (2009) 45 Cal.4th 1282, 1294.) Section 352 articulates the general rule that "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. It follows that if evidence satisfies the requirements of . . . 1108, including that it is not inadmissible under . . . 352, then the admission of that evidence does not violate . . . 1101." (*Daveggio and Michaud*, at p. 823.) Such "evidence is presumed admissible and is to be excluded only if its prejudicial effect substantially outweighs its probative value in showing the defendant's disposition to commit the charged sex offense or other relevant matters. [Citations.] The court's ruling admitting the evidence is reviewed for abuse of discretion. [Citation.]." (*People v. Cordova* (2015) 62 Cal.4th 104, 132 (*Cordova*); see also *Daveggio and Michaud*, at p. 827 [admission of prior crimes evidence pursuant to 1108 does not violate due process].)

Error in the admission or exclusion of evidence warrants reversal of a judgment only if an examination of """""the entire cause, including the evidence,""""""" discloses the error produced a "miscarriage of justice." (*People v. Breverman* (1998) 19 Cal.4th 142, 173.) A court's exercise of discretion under . . . 352 is tested for prejudice under the *Watson*[8] harmless error test. (*People v. Mullens* (2004) 119 Cal.App.4th 648, 659.) Under this test, "a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Watson*, at p. 836; see also *Breverman*, at p. 174.)

Defendant does not deny that 1108 applies here. Both of his 2006 convictions and his 2014 conviction were for qualifying sex offenses within the meaning of section 1108, subdivision (d). Nonetheless, he contends the trial court abused its discretion in allowing such evidence. It did not.

Nothing about the prior conviction evidence here "required the trial court to find the presumption in favor of admissibility had been overcome." (*People v. Loy* (2011) 52 Cal.4th 46, 62.) Rather than mere allegations of prior misconduct, "[d]efendant had been convicted of the other offenses, which supports their admission. Because his commission of those offenses had already been established, he bore no new duty to defend against the charges. Moreover, the jury would not be tempted to convict defendant of the charged crime to punish him for the other ones. [Citation.] Additionally, the 'evidence was presented quickly, with only the victim of each assault testifying.' [Citation.]" (*Cordova, supra*, 62 Cal.4th at p. 133.) So too here, with the exception of the 2011 incident, where the victim's mother—the percipient witness—described the incident.

[8] *People v. Watson* (1956) 46 Cal.2d 818.

Defendant argues the prior offenses were too far removed in time from the 2016 charged crime to be admissible. "Although this is a relevant factor for the court to consider in exercising its discretion [citation], the time gap alone does not compel exclusion of the evidence. Neither [352] nor [1108] contains rigid requirements." (*Cordova, supra*, 62 Cal.4th at p. 133.) Defendant does not point to any evidence that his character changed over the relevant time period or offer any reason that such a change might have occurred. (*Ibid.*)

Defendant also maintains the prior offenses were too dissimilar to the charged crime to be admissible. "Although this is also a relevant factor for the court to consider in exercising its discretion [citation], dissimilarity alone does not compel exclusion of the evidence. '"[T]he charged and uncharged crimes need not be sufficiently similar that evidence of the latter would be admissible under . . . 1101, otherwise . . . 1108 would serve no purpose. It is enough the charged and uncharged offenses are sex offenses as defined in . . . 1108."' [Citation.]" (*Cordova, supra*, 62 Cal.4th at p. 133; see also *People v. Branch* (2001) 91 Cal.App.4th 274, 285 [similarities between the prior and the charged offense may also balance out remoteness].) Moreover, any dissimilarities between the incidents goes to their weight, not their admissibility. (*People v. Hernandez* (2011) 200 Cal.App.4th 953, 967.)

"'"Prejudicial"'" is not synonymous with "'"damaging."'" (*People v. Bolin* (1998) 18 Cal.4th 297, 320.) Indeed, all inculpatory evidence is damaging to the defense case. Prejudice refers to evidence that "poses an intolerable risk to the fairness of the proceedings or reliability of the outcome." (*People v. Booker* (2011) 51 Cal.4th 141, 188.) We see no such risk in this instance. Accordingly, we conclude the trial court did not abuse its discretion under . . . 352 by admitting the . . . 1108 evidence.

ii. 1101b Evidence

"[S]ection 1101, subdivision (a) sets forth the '"strongly entrenched"' rule that propensity evidence is not admissible to prove a defendant's conduct on a specific

occasion." (*People v. Jackson* (2016) 1 Cal.5th 269, 299.) "At the same time, 'other crimes' evidence is admissible under . . . 1101, subdivision (b) 'when offered as evidence of a defendant's motive, common scheme or plan, preparation, intent, knowledge, identity, or absence of mistake or accident in the charged crimes.'" (*Id.* at p. 300.) "In this inquiry, the degree of similarity of criminal acts is often a key factor, and 'there exists a continuum concerning the degree of similarity required for cross-admissibility, depending upon the purpose for which introduction of the evidence is sought: "The least degree of similarity . . . is required in order to prove intent. . . ." . . . By contrast, a higher degree of similarity is required to prove common design or plan, and the highest degree of similarity is required to prove identity.' [Citation.]" (*Ibid.*)

We review a trial court's decision to admit or exclude evidence under Evidence Code section 1101 subdivision (b) for an abuse of discretion. (*People v. Vieria* (2005) 35 Cal.4th 264, 292.) Under this standard, the court's admissibility ruling "'must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Williams* (2013) 58 Cal.4th 197, 270-271.)

Here the court ruled the 2011 incident at the store was admissible to prove defendant's intent, and to negate any inference his conduct was the result of a mistake or an accident. "'[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or . . . other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act . . . .' [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant "'probably harbor[ed] the same intent in each instance."' [Citations.]" (*Ewoldt, supra*, 7 Cal.4th at p. 402; accord *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1222-1223, fns. omitted.)

Even so, "'when the other crime evidence is admitted solely for its relevance to the defendant's intent, a *distinctive* similarity between the two crimes is often unnecessary for the other crime to be relevant. Rather, if the other crime sheds great light on the defendant's intent at the time he committed that offense it may lead to a logical inference of his intent at the time he committed the charged offense if the circumstances of the two crimes are substantially similar even though not distinctive.' [Citation.]" (*People v. Demetrulias* (2006) 39 Cal.4th 1, 16-17.) Both below and on appeal defendant has suggested that his conduct vis-à-vis the keys and reaching up G.L.'s shorts could have been "accidental." The 2011 incident was relevant to negate this suggestion.

Defendant also maintains evidence of the 2011 incident at the store should have been excluded under . . . 352. Under . . . 352, "'the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice . . . .'" (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1337.) For purposes of . . . 352, "'[P]rejudice means evidence that [uniquely] tends to evoke an emotional bias against the defendant [as an individual,] with very little effect on issues, not evidence that is probative of a defendant's guilt.' [Citation.]" (*People v. Valdez* (2012) 55 Cal.4th 82, 133 (*Valdez*).)

As discussed, J.L.'s testimony regarding defendant's similar 2011 disorderly conduct offense was highly probative in light of defendant's argument that "he only touched [G.L.'s vaginal area] accidentally, while picking up his keys." Equally so was the evidence of defendant's use of the same dropped keys ploy inside the market when he tried to look up J.L.'s shorts. Put simply, "when a defendant admits committing an act but denies the necessary intent for the charged crime because of mistake or accident, other-crimes evidence is admissible to show absence of accident." (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 204.)

In comparison to its probative value, the risk of prejudice here was minimal, as the evidence of the 2011 incident was brief and was presented through the child's mother and not the child. Accordingly, we cannot say that the probative value of the evidence was outweighed by its potential for prejudice within the meaning of 352. (*Valdez, supra,* 55 Cal.4th at p. 133.) A court's rulings made under1101(b) and 352 will not be disturbed on appeal unless they are arbitrary, capricious or patently absurd. (*People v. Rogers* (2013) 57 Cal.4th 296, 326.) The trial court's rulings in this case do not fall into any of those categories.

Lastly, defendant contends the admission of evidence of his prior crimes under 1101b and 1108 violated his federal constitutional right to due process. We are not persuaded.

Defendant did not make this objection in the trial court, so it was forfeited. In any event, "the admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*." (*People v. Partida* (2005) 37 Cal.4th 428, 439.) "[R]ejection, on the merits, of a claim that the trial court erred on the [evidentiary] issue actually before that court necessarily leads to rejection of the newly applied constitutional 'gloss' as well. No separate constitutional discussion is required in such cases . . . ." (*People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17.) Because we have concluded that the evidence of the prior incidents was properly admitted under 1108 and 1101b, his constitutional claims, even if they are cognizable on appeal, similarly fail. (See *Valdez, supra,* 55 Cal.4th at p. 134.)

The trial court's ruling regarding the admissibility of evidence of defendant's prior sex offense convictions did not render his trial fundamentally unfair. There were legitimate permissible inferences that could be drawn from those convictions and, under the limiting instructions given, the evidence underlying those convictions did not render his trial fundamentally unfair.

3. There Was No Prejudicial Prosecutorial Misconduct

Defendant next argues the prosecutor committed prejudicial misconduct in his closing arguments. We disagree.

A. Legal Background

"'Improper comments by a prosecutor require reversal of a resulting conviction when those comments so infect a trial with unfairness that they create a denial of due process. [Citations.] Conduct by a prosecutor that does not reach that level nevertheless constitutes misconduct under state law, but only if it involves the use of deceptive or reprehensible methods to persuade the court or jury. [Citation.]' [Citation.]" (*Winbush, supra*, 2 Cal.5th at p. 480.) "For a prosecutor's remarks to constitute misconduct, it must appear reasonably likely in the context of the whole argument and instructions that '"the jury understood or applied the complained-of comments in an improper or erroneous manner."' [Citation.]" (*Ibid*.) "'In conducting [our] inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.' [Citation.]" (*People v. Covarrubias* (2016) 1 Cal.5th 838, 894.)

"'As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.'" (*Winbush, supra*, 2 Cal.5th at p. 481.) The Attorney General contends, and we agree, that defendant forfeited his claim of prosecutorial error by failing to make a timely objection. There is nothing in the record to indicate that an objection would have been futile or that the prosecutor's argument was "so extreme or pervasive that a prompt objection and admonition would not have cured the harm." (*People v. Centeno* (2014) 60 Cal.4th 659, 674 (*Centeno*).) Accordingly, we analyze defendant's alternative argument that defense counsel's failure to object constituted ineffective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, a defendant must show (1) objectively deficient performance by his counsel and (2) resulting prejudice. (*Centeno*, *supra*, 60 Cal.4th at p. 674.) While we presume counsel's performance fell within a wide range of professional competence and sound trial strategy, counsel is deficient if there is no conceivable tactical purpose for the failure to object. (*Id.* at pp. 674-675.) Prejudice is shown only if there is no "'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" (*Id.* at p. 676.) Because the decision whether to object to a prosecutor's comments during closing argument is highly tactical, "'a mere failure to object to evidence or argument seldom establishes counsel's incompetence.'" (*Id.* at p. 675.)

B. Analysis

i. Reasonable Doubt

Defendant attacks the portion of the prosecutor's rebuttal argument where he said: "[L]et's talk about that 'beyond a reasonable doubt' standard. [¶] [Y]es, it's the highest burden of proof in the court system. But guess what. Juries use that every single day in this country and convict on it every single day. And in the federal system. It is not an impossible burden to meet."

Defendant contends this is "a nearly identical argument" as the one found erroneous in *People v. Nguyen* (1995) 40 Cal.App.4th 28 (*Nguyen*). Not so.

First, defendant's quotation from the prosecutor's argument in *Nguyen* is not only incomplete, but it omits the portion of the argument the court actually found objectionable. In *Nguyen*, the prosecutor's full argument was: "'The standard is reasonable doubt. That is the standard in every single criminal case. And the jails and prisons are full, ladies and gentlemen. [¶] It's a very reachable standard that you use every day in your lives when you make important decisions, decisions about whether you want to get married, decisions that take your life at stake when you change lanes as

you're driving. If you have reasonable doubt that you're going to get in a car accident, you don't change lanes.'" (*Nguyen, supra*, 40 Cal.App.4th at p. 35.)

This argument was improper because an "argument that people apply a reasonable doubt standard 'every day' and that it is the same standard people customarily use in deciding whether to change lanes trivializes the reasonable doubt standard. It is clear the almost reflexive decision to change lanes while driving is quite different from the reasonable doubt standard in a criminal case. The marriage example is also misleading since the decision to marry is often based on a standard far less than reasonable doubt, as reflected in statistics indicating 33 to 60 percent of all marriages end in divorce." (*Nguyen, supra*, 40 Cal.App.4th at p. 36.)

The prosecutor here made no remotely similar analogies in his closing argument. Rather, in response to defense counsel's "chart" showing the different levels of proof in the legal system, he acknowledged "it's the highest burden of proof in the court system." He did state "[i]t is not an impossible burden to meet," but that correctly characterizes the definition of reasonable doubt because "[t]he evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt." (See CALCRIM No. 103.) Moreover, he went on to correctly say that the reasonable doubt standard "[i]s an abiding conviction that the charge is true. . . . It's a long lasting belief the charge is true. What this means is you come to your decision, you find him guilty, a week from now, a year from now, you're still going to think he's guilty."

The prosecutor's remarks regarding reasonable doubt were not improper. Because we find that the prosecutor's comments were not objectionable, defense counsel's failure to object to them does not reflect a deficiency in his performance. Defendant was not, therefore, deprived of his right to effective assistance of counsel.

Second, even assuming the remarks were improper, defendant did not object. As in *Nguyen*, defendant "was not prejudiced since the prosecutor did direct the

jury to read the reasonable doubt instruction and the jury was correctly instructed on the standard. We must presume the jury followed the instruction and that the error was thereby rendered harmless." (*Nguyen, supra*, 40 Cal.App.4th at pp. 36-37.) So too here.

Defendant did not object to the prosecutor's argument, and the jury was correctly instructed on the meaning of reasonable doubt both before trial and before closing arguments began. The prosecutor told the jury that whatever the attorneys say in argument is not evidence, and the court twice repeated that admonition with CALCRIM No. 104. We "presume the jury followed the court's instructions and not the argument of counsel." (*People v. Valdez* (2004) 32 Cal.4th 73, 114, fn. 14.) Any error was necessarily harmless and, as such, "any failure by counsel was likewise harmless." (*Nguyen, supra*, 40 Cal.App.4th at p. 37, fn. 2.)

ii. Burden of Proof Claim

a. The Prosecutor's Circumstantial Evidence Arguments

Defendant focuses on the portion of the prosecutor's rebuttal argument, in which he said: "And when you're thinking about circumstantial evidence, [defense counsel] talked to you a little bit about that [jury] instruction. The thing about circumstantial evidence is, yes, if there were two or more reasonable—reasonable—conclusions, you do have to take the one that points to innocence. But guess what. They've [got] to be reasonable conclusions, not based on theor[ies], but based on the evidence that has come in in this case. And you all decide this. It's not speculative theor[ies] that the defense attorney throws out in their arguments; it's what the evidence shows. And there is one reasonable conclusion only in this case; and that is that the defendant is guilty." No objection was made to these remarks, and the claim is therefore forfeited on appeal. (*People v. Ledesma* (2006) 39 Cal.4th 641, 740.)

Even if we were to consider the matter, we would also reject it on the merits. In reviewing the propriety of closing arguments, we "must [consider the

challenged] statements in the context of the argument as a whole" to make our determination. (*People v. Cole* (2004) 33 Cal.4th 1158, 1203.)

The context here is the inferences to be drawn from circumstantial evidence. There was no misconduct with respect to the quoted excerpt, referencing the inferences to be drawn from circumstantial evidences. In urging the jury to adopt the reasonable inferences, the prosecutor was not discussing the beyond a reasonable doubt standard of proof that the prosecution is required to meet. Defendant's arguments to the contrary, the prosecutor's comment did not directly or inferentially lessen the standard of proof.

Unlike the prosecutor in *Centeno,* here the prosecutor did not conflate reasonable doubt with reasonable interpretations of the evidence. (See CALCRIM No. 224 [stating in part "[B]efore you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty"].) The prosecutor did not discuss reasonable doubt while discussing circumstantial evidence. The jury would understand the prosecutor's discussion of the reasonable interpretation of the evidence to be linked to his statement that the jury must be firmly convinced that guilt is the only reasonable interpretation of the circumstantial evidence. (See *People v. Cowan* (2017) 8 Cal.App.5th 1152, 1162.)

In any event, any alleged error was not prejudicial. Our conclusion that the prosecutor's comments did not diminish the reasonable doubt standard "is reinforced by the fact that the trial court . . . admonished the jurors . . . that they were required to follow the law and base their decision solely on the law and instructions as given to them *by the court*. Those admonishments were sufficient to dispel any potential confusion raised by the prosecutor's argument. No basis for reversal appears." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1157; *People v. Morales* (2001) 25 Cal.4th 34, 47.)

b. The Prosecutor's Witness Credibility Arguments

Defendant next turns to another isolated portion of the prosecutor's argument: "Because if you say [defendant is] not guilty, then you have to either basically say it wasn't him. And I don't even think [defense counsel is] arguing he wasn't there. So that's out. So you basically have to say he never touched [G.L.], which you basically have to say [G.L. is] lying, which is ridiculous. There's no reason for her to do that. . . . [¶] . . . [¶] There's no reason for her to do that. She has no motive to do that. . . . [¶] . . . [¶] And there's an eight-year-old girl who doesn't want to be here talking to you all about this. That's not fun for her. It's not interesting for her. That's not exciting for her. It's scary for her. So why in the world would she not be telling you the truth? Particularly when she's been consistent the entire case. From the day that it happened. So that's ridiculous, too, that she's lying."

Defense counsel objected three times during this latter part of the argument, asserting it constituted improper "vouching," and was "lessening the burden" of proof. The court overruled the objections.

As noted above, "'"a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on *the same ground*—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.'" (*Winbush*, *supra*, 2 Cal.5th at p. 481, italics added.) On appeal, defendant does not raise an alleged "vouching" argument, so we need not consider it. We treat his appellate argument that the prosecutor "misstated the burden of proof" in this second set of remarks as the functional equivalent of trial counsel's "lessening the burden" of proof objection.

But as we observed above, the prosecutor correctly stated the burden of proof and what it entailed. His comments about G.L.'s credibility did not invite the jury to disregard the burden of proof and reach improper conclusions. The context here is once more important because the prosecutor's remarks were made in response to defense

counsel's argument that implied G.L. testified inaccurately. A prosecutor may comment on defendant's interpretation of events without erroneously suggesting defendant bears the burden of proof. (*People v. Lewis* (2004) 117 Cal.App.4th 246, 256-257.) Here, there is no reasonable likelihood the jury would have interpreted these comments as an attempt to lessen the prosecution's burden of proof. The prosecutor's statement was permissible criticism of the defense insinuations that G.L. lied.

The prosecutor repeatedly cited the correct burden of proof and stated that here the evidence established "proof beyond all doubt." Looking at the entirety of the prosecutor's closing argument, he did nothing to lessen the burden of proof. As a result, there was no error.

4. *There Was No Cumulative Error*

Defendant next contends he was denied his right to a fair trial due to the cumulative effect of the purportedly erroneous *Batson*/*Wheeler* ruling, evidentiary errors, and prosecutorial misconduct. The "'litmus test' for cumulative error 'is whether defendant received due process and a fair trial.'" (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.) "A predicate to a claim of cumulative error is a finding of error." (*People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1068.) Here, because there were no errors, there is no cumulative effect of multiple errors, the only situation in which the cumulative error doctrine applies. (*People v. Williams* (2013) 56 Cal.4th 165, 201, abrogated on other grounds in *People v. Elizalde* (2015) 61 Cal.4th 523.) Defendant received the process he was due and a fair trial.

5. *The Trial Court Did Not Abuse Its Discretion in Concluding the Victim's School Records Contain Nothing the Defendant Was Entitled to Obtain*

A trial court determines whether there is good cause to disclose confidential material such as a child's school records. (*Kling v. Superior Court* (2010) 50 Cal.4th 1068, 1074-1075.) "Subdivision (a) of Education Code section 49076 limits public access to 'pupil records' generally: 'A school district shall not permit access to pupil

records to a person without written parental consent or under judicial order . . . ." (*Cuff v. Grossmont Union High School Dist.* (2013) 221 Cal.App.4th 582, 592; cf. *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 61 [in camera review of confidential records was required where the defendant claimed they might undercut the molestation victim's credibility and where state law did not bar their disclosure under all circumstances].)

In this context, we review the trial court's determination of good cause for an abuse of discretion, i.e., whether it was "arbitrary or capricious." (*People v. Pelayo* (1999) 69 Cal.App.4th 115, 121-122.) The Attorney General does not object to our examination of G.L.'s subpoenaed school records to assess whether the trial court acted within its discretion in refusing to divulge any of their contents.

We have reviewed the 30-page packet containing G.L.'s school records that was sent to the trial court from the Anaheim Elementary School District. We find no error or abuse of discretion by the trial court; her records contain nothing material to the defense. (*People v. Martinez* (2009) 47 Cal.4th 399, 454, fn. 13.)

6. *The Trial Court Erred in Ordering AIDS Testing Without a Probable Cause Determination*

Penal Code section 1202.1 provides in pertinent part that the trial court "[s]hall order every person who is convicted of . . . a sexual offense listed in subdivision (e) . . . to submit to a blood or oral mucosal transudate saliva test for evidence of antibodies to the probable causative agent of acquired immunodeficiency syndrome (AIDS) within 180 days of the date of conviction." (Pen. Code, § 1202.1, subd. (a).) "For purposes of this section, 'sexual offense' includes: . . . [¶] . . . [¶] [l]ewd or lascivious conduct with a child in violation of Section 288," but only if "the court *finds that there is probable cause* to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim." (Pen. Code, § 1202.1, subd. (e)(6)(A)(iii), italics added.)

Defense counsel objected to the order for AIDS testing. The trial court believed AIDS testing was mandatory, and made no inquiry into whether there was probable cause to believe defendant transferred bodily fluid to the victim. Put simply, the court ordered AIDS testing without finding probable cause. The proper remedy is to remand the matter for further proceedings to determine whether the prosecution has additional evidence that may establish the requisite probable cause. (*People v. Butler* (2003) 31 Cal.4th 1119, 1123 (*Butler*).)

Defendant argues remand is unwarranted, and cites *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, in support. The case is inapt because it involved whether remand was necessary to give the trial court an opportunity to exercise its discretion to dismiss three strikes convictions when it "clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations [and] [¶] [t]hat it would not . . . have exercised its discretion to lessen the sentence." (*Id.* at p. 1896.)[9]

Here, however, "[g]iven the significant public policy considerations at issue, we conclude it would be inappropriate simply to strike the testing order without remanding for further proceedings to determine whether the prosecution has additional evidence that may establish the requisite probable cause. . . . Given the serious health consequences of HIV infection, it would be unfair to both the victim and the public to permit evasion of the legislative directive if evidence exists to support a testing order." (*Butler, supra,* 31 Cal.4th at p. 1129.)

Accordingly, the appropriate remedy in this case is "to remand the matter for further proceedings at the election of the prosecution." (*Butler, supra,* 31 Cal.4th at p. 1129.)

[9] Defendant also cites *People v. McDaniels* (2018) 22 Cal.App.5th 420, but it too is a sentencing case, and their remand was actually found appropriate. (*Id.* at p. 428.)

DISPOSITION

The order requiring defendant to submit to testing for AIDS is vacated and the matter is remanded. If the prosecutor requests an AIDS testing hearing within 60 days of the filing of the remittitur, the trial court shall conduct a further hearing, at which defendant shall be present, concerning whether the offense was a "sexual offense" within the meaning of Penal Code section 1202.1, subdivision (e)(6). If no request is made, the clerk of the superior court is directed to amend the abstract of judgment and forward a copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

THOMPSON, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.